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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1992

THE REAL PROPERTY AND PREMISES KNOWN
AS 4408 HILLSIDE COURT
ALEXANDRIA, VIRGINIA 22306
AND
SHARON JARRELL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

When an individual is faced with parallel criminal and civil proceedings, is it a violation of his Fifth Amendment right against self-incrimination for a United States District Court to arbitrarily refuse to grant an accomodation, in the civil proceeding, sufficient to fully protect that contitutional right?

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The petitioners, The Real Property and Sharon Jarrell, request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on June 2, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit dated June 2, 1992, is unreported (Appendix "A"). The United States District Court for the Eastern District of Virginia did not issue a formal opinion in this case; however, a transcript of the August 30, 1991 summary judgment proceeding has been attached as Appendix "B".

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 2, 1992. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is, no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

STATEMENT OF THE CASE

On March 12, 1991, Fairfax County Police officers entered and searched the house located at 4408 Hillside Court in Alexandria Virginia owned by Sharon Jarrell. Upon search of the premises, the officers recovered a controlled substance and objects allegedly used to facilitate the sale of controlled substances.

On April 24, 1991, pursuant to 21 U.S.C. § 881(a)(7), the United States of America brought this forfeiture action alleging that the property was used to facilitate the possession, storage, and distribution of a controlled substance. The following day, April 25, 1991, the Commonwealth of Virginia instituted a parallel criminal proceeding against Jarrell. Pursuant to VA. Code § 18.2-248, Jarrell was charged with possession of cocaine

with intent to distribute based upon evidence seized from the property.[1]

On May 13, 1991, Jarrell filed a claim to the property as its sole owner. On July 25, 1991, the United States attempted to depose Jarrell in this forfeiture proceeding. However, in an attempt to protect herself in the parallel criminal proceeding Jarrell was forced to assert her Fifth Amendment privilege and declined to be deposed.

On August 9, 1991, the United States filed a motion for summary judgment.[2] In support of this motion, the United States filed the Affidavit of Investigator Crank of the Fairfax County Police Department. Pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, Jarrell was compelled to file a counter-affidavit or have summary judgment entered against her. As a result, Jarrell filed an affidavit on August 19, 1991 asserting the innocent owner defense of 21 U.S.C Section 881(a)(7).

On August 29, 1991, the United States moved the U.S. District Court for the Eastern District of Virginia, Alexandria Division to strike Jarrell's affidavit and grant its motion for summary judgment. The United States contended that admitting Jarrell's affidavit would be improper in that Jarrell had earlier exercised her Fifth Amendment privilege in response to the United States' attempt to depose her.

In response to the United States' motion to strike her affidavit, Jarrell was for the first time forced to seek an accommodation of her Fifth Amendment privilege. In order to defend her property, Jarrell agreed to be deposed upon the granting of some form of accommodation was granted to sufficiently protect her constitutional rights.

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[1] This charge was later dropped at the preliminary hearing stage on September 4, 1991.

[2] This date corresponded precisely with the date for the closing of discovery, August 9, 1991.

On August 30, 1991, after a non-evidentiary hearing, the District Court refused to accommodate the Jarrell's interests, striking her affidavit and ordering summary judgment, forfeiting the property to the United States. In granting summary judgment, the District Court did concede that the admission of the claimant's affidavit would have raised a material issue of fact and thus preclude summary judgment. *Appendix B-8*. On September 10, 1991, pursuant to 28 U.S.C. § 1291, Jarrell appealed the District Court's ruling to the U.S. Court of Appeals for the Fourth Circuit. On June 2, 1992, the Fourth Circuit affirmed the trial court's ruling. Pursuant to 28 U.S.C. § 1254(1), the Jarrell now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

By instituting parallel civil and criminal proceedings against Jarrell and this property, the United States forced Jarrell to either compromise her constitutionally guaranteed rights (by agreeing to be deposed in the civil proceeding) or assert her fifth-amendment privilege and forfeit her home to the government. To exacerbate this dilemma, in direct conflict with long-standing precedent from other circuits, the courts below committed reversible error by arbitrarily refusing to accommodate the competing interests of Jarrell and the United States. This case amply demonstrates the onerous burden citizens endure when faced with parallel criminal and civil proceedings. In short, the result was a forgone conclusion when the State government initiated a criminal prosecution *one day after* the Federal government initiated a forfeiture proceeding based upon the same evidentiary material.

The United States used Jarrell's refusal to be deposed for its own benefit, a refusal which was created and almost mandated by the government's strategic maneuvering. The government proceeded along its carefully charted course by filing a motion for summary judgment accompanied by a sworn affidavit on the day discovery closed and Jarrell could potentially

no longer be deposed. The government's maneuvering compelled Jarrell to file an affidavit in order to preclude summary judgment.[3]

Moreover, on the day before the summary judgment motion was scheduled to be heard, the United States moved to strike the Jarrell's affidavit on the grounds that she refused to be deposed. The government was well aware that Jarrell could not have agreed to be deposed previously due to the parallel criminal proceeding.

The government knew full well that Jarrell's previous refusal to be deposed would allow it to argue that her subsequent affidavit in opposition to summary judgment should be stricken despite her timely request for accommodation when summary judgment was filed and argued. Indeed, remedies available to the District Court at that point were numerous, e.g., granting Jarrell immunity, staying the civil proceeding, continuing the summary judgment motion, re-opening discovery to allow Jarrell's deposition, etc. Instead, the District Court refused any accommodation, automatically resulting in summary judgment in favor of the United States.

Jarrell comes to this Court seeking only sufficient accommodation of her interest to preserve the true protection of the Fifth Amendment from being undermined by the heavy-handed conduct of the government in this case. The lower courts have told the Jarrell that her request was made too late. Jarrell prays that this Court will recognize that it was the government's actions which prevented her from realizing the inevitability of her position, and the need for such an accommodation until it was "too late." Jarrell asserts that due to the nature of the right being violated and the calculated conduct of the government in this case, it is not too late to compel an accommodation of her interests.

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[3] See Federal Rules of Civil Procedure 56 (e).

I. The Fifth Amendment bestows upon every individual the privilege not to be compelled to incriminate himself and the unbridled ability to assert it.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." This constitutional protection is designed to establish a more equitable relationship between the state and the individual:

> The policy of the privilege is to regulate a particular government-governed relation—-first, to help prevent inhumane treatment of persons from whom information is desired and, second, to satisfy popular sentiment that, when powerful and impersonal government arrays its forces against solitary governed, it would be a violation of the individual's "sovereignty" and less than fair for the government to be permitted to conscript the knowledge of the governed to its aid.

Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 56 (footnote 5) (1964).

The Fifth Amendment protects the individual not only from "being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924). In addition the right to *freely* and *voluntarily* choose whether or not to invoke the Fifth Amendment privilege must be scrupulously protected.

This right was especially vulnerable to governmental abuse in the petitioner's case. Not only was the government pursuing parallel proceedings at the same time using the same alleged

acts, but the government's tactics were designed to penalize the petitioner with the forfeiting of her home for asserting her Fifth Amendment privilege. The accused must not be "deprived of his free choice to admit, to deny, or to refuse to answer." *Garrity v. State of New Jersey*, 385 U.S. 493, 496 (1967); *Lisenba v. People of State of California*, 314 U.S. 219, 241 (1941). As Justice Holmes stated, "Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of failure to accept it." *Union Pac. R.R. Co. v. Public Service Comm.*, 248 U.S. 67, 70 (1918).

II. The Government has impermissibly penalized the Defendant for asserting her Fifth Amendment rights.

The petitioner's Fifth Amendment privilege "guarantees against federal infringement - the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer *no penalty* ... for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1974) (emphasis added). "The Supreme Court has consistently held that a penalty may not be placed upon one for exercising his privilege against self-incrimination." *United States v. Detroit Vital Foods, Inc.*, 407 F.2d 570, 574 (1969); see: *Spevack v. Klein*, 385 U.S. 511 (1967); *Slochower v. Bd. of Education*, 350 U.S. 551.

"In this context "penalty" is not restricted to fine or imprisonment. It ... [is] ... the imposition of any sanction which makes the assertion of the Fifth Amendment privilege "costly"." *Spevack*, 385 U.S. at 514; *Griffin v. State of California*, 380 U.S. 609, 614 (1965). In *Spevack*, the Court found that burdening the defendant's Fifth Amendment privilege with economic sanctions "is indeed as powerful an instrument of compulsion as the use of legal process to force from the lips of the accused individual the evidence necessary to convict him." *Spevack*, 385 U.S. at 516; *United States v. White*, 322 U.S. 694, 698 (1944).

In the petitioner's case, the government in effect and by design penalized the petitioner with what amounted to the automatic forfeiture of her home for asserting her Fifth Amendment privilege. When the petitioner asserted her Fifth Amendment privilege and choose not to potentially incriminate herself, she lost any realistic opportunity to protect her home from forfeiture. Perhaps no penalty, save the actual loss of one's freedom, can be more devastating. Even in hindsight, the petitioner at best was left with "a choice between the rock and the whirlpool." *Stevens v. Marks*, 383 U.S. 234, 243 (1966); *Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 593 (1926). "A person may not be required to supply information which may possibly incriminate him upon penalty of suffering a forfeiture of his property. This is a "compelling" which is prohibited by the Fifth Amendment." *Detroit Vital Foods*, 407 F.2d at 573.

As a result of the previously highlighted infringements upon the petitioner's constitutional rights, she was "in effect, penalized for asserting a fundamental constitutional right." *Pacers, Inc. v. Superior Court*, 208 Cal.Rptr. 743, 745 (1984). The petitioner's inability to submit an affidavit on her own behalf, because she asserted her "Fifth Amendment privilege made asserting that privilege "costly"". *Id* at 745. The effect of the government's tactics in these parallel proceedings violates the very tenets of the Fifth Amendment. The petitioner's inherent constitutional rights cannot be unilaterally disregarded in this manner and must be accommodated.

III. The failure of the District Court to accommodate the Defendant's Fifth Amendment privilege, by unilaterally deciding to strike the Defendant's affidavit, is reversible error and must be rectified by this court.

A. A trial court must attempt to accommodate the Defendant's Fifth Amendment privilege.

In *United States v. U.S. Currency*, 626 F.2d 11 (1980), the court recognized that "[c]learly, appellees should not be compelled to choose between the exercise of their Fifth Amendment privilege and the substantial sums of money which are the subject of this forfeiture proceeding." *Id* at 15. Therefore, in light of the constitutional mandate, "the courts *must* seek to accommodate both the constitutional right against self-incrimination as well as the legislative intent behind the forfeiture provision." (emphasis added) *Id* at 15.

In a similar parallel proceedings scenario, the court in *Pacers, Inc.*, 208 Cal.Rptr. 743, concluded that "the superior court abused its discretion in failing to fashion a remedy accommodating the interests of both petitioners and real parties." *Id* at 744. "Where, as here, a defendant's silence is constitutionally guaranteed, the court should weigh the parties' competing interests with a view toward accommodating the interests of both parties." *Id* at 745.

Not surprisingly, the government failed to make any attempt to accommodate the petitioner's rights while making every effort to restrict them. In fact, the granting of such an accommodation would have significantly hindered the government's ability to so easily extract a valuable penalty from the petitioner for asserting her Fifth Amendment privilege.

The District Court also remained indifferent to the petitioner's plea for an accommodation of her constitutionally guaranteed rights and struck her affidavit. The court stated, "I

don't think she can take the Fifth Amendment when she is sought to be deposed, and then come in and, after depriving the Government of its [civil] discovery effort, file an affidavit which creates issues of fact." *Appendix B-8*. Consequently, the court held, "I think the affidavit must be stricken, and I will strike it." *Appendix B-8*.

However the petitioner was in no way attempting to hinder the government's discovery effort. Contrary to the court's interpretation of the petitioner's position she "would not have done that [assert the Fifth Amendment] ... had this forfeiture action followed the State prosecution, but it is paralleling it." *Appendix B-3*. However, at the time of her deposition the government offered no accommodation, and the petitioner was unable to predict the government's future conduct which would later require her to seek an accommodation. In fact, upon discovering what the government had done the petitioner didn't "have any problem if after the State Court prosecution is terminated, the Government takes her deposition ... I would respectfully request that the Court ... accommodate ... [the petitioner's] fifth amendment right." *Appendix B-4*.

There is a clear distinction between the petitioner's valid assertion of her Fifth Amendment privilege and an attempt to hinder discovery. The distinction was drawn in *Pacers, Inc.*, 208 Cal.Rptr. 743, where the defendants claimed that their Fifth Amendment privileges were being violated by a discovery request in a civil forfeiture proceeding which was running parallel to a criminal proceeding against them. The defendants "received no immunity against the use of their deposition answers or evidence derived from those answers in any criminal proceeding against them." *Id* at 745. The court found that it was "not confronted here with a party who willfully deprives his adversary of information." *Id* at 745. Instead these were defendants struggling to protect their rights against self-incrimination

from the hazards of parallel proceedings and thus they deserved to have their privilege accommodated.

However, the District Court failed to appreciate this distinction. Neither did it appreciate the fact that the petitioner, as well as the government, had legitimate interests which needed to be accommodated. As a result, the District Court struck the petitioner's affidavit and thus failed to adequately account for the interests of the petitioner. Instead, it adopted a position which resulted in an arbitrary choice to champion the government's rights to the exclusion of those of the petitioner.

B. The District Court committed reversible error in striking the petitioner's affidavit and the Fifth Amendment mandates remedying that mistake.

The petitioner asks that the decision to strike her affidavit be overturned thus breathing life into a Fifth Amendment privilege suffocated by the lower courts' decisions. The variety of alternatives which could sufficiently accommodate the interests of both the petitioner as well as the government are to be left within the Court's discretion.

The court in *United States v. U.S. Currency*, 626 F.2d 11, faced an analogous civil forfeiture proceeding, running parallel to a criminal prosecution. The trial court felt that the resulting infringement upon the defendant's Fifth Amendment privilege was of such magnitude to warrant dismissal of the government's forfeiture case. While the government appealed this decision as being too drastic a measure, *in its own brief the government explicitly recognized the need to accommodate the defendants' Fifth Amendment privilege:*

> ... appellees have the right to invoke the privilege against self-incrimination. It follows from this that no sanction may be imposed as a result of relying on that privilege ... We recognize that it would be a deprivation of fundamental rights to prevent appellees from

> attempting to prove their claims to the property merely because they may legitimately invoke their Fifth Amendment rights with respect to some of the questions in the interrogatories filed below. By this we mean that appellees should not have to choose between waiving their privilege against self-incrimination in order to satisfy their burden of proof, and remaining silent, thereby giving up the opportunity to prove their claims to the property at issue in the case. Brief p.9

United States v. U.S. Currency, 626 F.2d at 14-15.

The court also recognized the same inherent hazards of parallel proceedings and the need to fashion a remedy accommodating both the defendant and the government:

> The foregoing demonstrates that, especially in light of the posture of a forfeiture proceeding, in which the defendant actually has the burden of proof, the appellees here have the unenviable choice of incriminating themselves, or, of failing to file an answer, under oath, to the government's complaint and failing to vigorously pursue their claims to the currency ... Therefore, this matter should be remanded to the District Court for exploration into the alternatives available for said accommodation, that is, for achieving what the government has described as "a solution which both protects the privilege and permits the forfeiture case to go forward."

United States v. U.S. Currency, 626 F.2d at 15-16.

The court explored the range of constitutionally permissible paths that could subsequently be followed and then noted there to be "several alternatives ... which might be appropriate." Id at 16. The optimal choice is the one "which strikes a fair balance and accommodates both parties." *Id* at 16.

1. The District Court could have stayed the forfeiture action pending the outcome of the criminal prosecution.

One possible alternative would be for the District Court "to stay the forfeiture proceedings until the completion of any criminal prosecutions." *United States v. U.S. Currency*, 626 F.2d at 17. "It has long been the practice to "freeze" civil proceedings when a criminal prosecution involving the same facts is warming up or under way ... [and] ... we have repeatedly approved this practice." *Peden v. United States*, 512 F.2d 1099, 1103 (1975). The court in *Peden* went on to explain that, "[t]he "freeze" ... rises out of a sense that deferrable civil proceedings constitute improper interference with the criminal proceedings if they churn over the same evidentiary material." *Id* at 1103.

In *United States v. Certain Real Property*, 751 F.Supp 1060 (1989), the government moved for forfeiture of the defendants' property as being used to facilitate narcotics trade. The defendants asserted that unless they were granted a stay of discovery in the civil proceeding, "they will be confronted with the Hobson's choice of answering the complaint ... thereby waiving their Fifth Amendment right ... thereby prejudicing the defense of criminal actions against them, or refusing ... to answer ... in which case their property will be forfeited." *Id* at 1061.

The court went on to hold, "[i]f delay of the noncriminal proceeding would not seriously injure the public interest, a court may be justified in deferring it." *United States v. Certain Real Property*, 751 F.Supp at 1062. Therefore, the court granted the stay noting that while it "may cause some inconvenience and delay to the [government], protection of the defendant[s'] constitutional rights against self-incrimination is the more important consideration." *Id* at 1063.

A similar conclusion was reached in *United States v. U.S. Currency*, 626 F.2d 11, where the court felt that if there is no strong public interest in an hasty conclusion to the forfeiture

proceeding and the government would suffer no appreciable prejudice from the delay, then "there seems to be little reason why a stay in that proceeding would not be proper under the circumstances." *Id* at 18.

In addition to endorsing the staying of the civil proceeding, the court in *Wehling v. Col. Broad. System*, 608 F.2d 1084, 1089 (1979), held that the failure of the trial court to grant such a stay to the defendant who faces parallel proceedings was reversible error. "Because staying discovery would not impose undue hardship ... and, therefore, would protect the party exercising a constitutional privilege from *unnecessary* adverse consequences, we believe the court abused its discretion in denying [such]." *Id* at 1089.

After acknowledging the danger of self-incrimination in a civil forfeiture proceeding running parallel to a criminal prosecution, the court in *Resek v. State*, 706 P.2d 288, addressed the issue of providing a sufficient remedy:

> In forfeiture actions, the self-incrimination issue can be resolved simply by staying the proceeding until the criminal prosecution is concluded ... When the claimant so requests ... the trial court should stay the independent civil in rem forfeiture proceeding under this section, in the absence of strong countervailing circumstances. If such circumstances do exist, use and derivative-use immunity may serve to protect the claimant's privilege against self-incrimination.

Id at 294.

The granting of a stay until the conclusion of the criminal prosecution would be, in the petitioner's opinion, the optimal method of accommodation. In that the criminal proceeding against the petitioner has already been dismissed since the summary judgment hearing, the case need only be remanded to

the District Court. At which time the petitioner would willingly submit to a deposition and then proceed to a trial on the merits.

2. The District Court could have fully immunized petitioner's deposition testimony.

Another alternative would be a "grant of immunity to appellees." *United States v. U.S. Currency*, 626 F.2d at 16. In appraising the merits of this approach, "the District Court should be particularly mindful of the potential for prosecution under state law." Id at 17. Any grant of immunity must be coextensive with the protection the defendant would have enjoyed by asserting the Fifth Amendment privilege. In fact, in *Shaffer v. United States*, 528 F.2d 920 (1975), the Fourth Circuit ruled favorably on such a procedure as protective of the interests of both the government and the defendant.

In *Shaffer*, the defendant was indicted for illegal gambling activity. In a parallel civil action, the defendant was asserting a claim against the Internal Revenue Service for the refund of certain wagering taxes already paid. "When the Government sought to take Shaffer's deposition, he declined to answer certain questions and refused to submit information on Fifth Amendment self-incrimination grounds." *Shaffer v. United States*, 528 F.2d at 921. The district court then unilaterally ordered the defendant to meet the discovery requests without making any attempt to accommodate his interests. When the defendant continued to refuse to answer, the district court entered judgment against him stating, "while Shaffer was entitled to remain silent, he was required to choose between maintaining his silence and continuing his lawsuit." *Id* at 921.

In reversing the district court, the Fourth Circuit had "grave doubts about the propriety of ordering discovery materials claimed to be privileged under the Fifth Amendment, particularly when the refusal to comply with such an order provides the basis for the dismissal of a suit." *Shaffer v. United States*, 528 F.2d at 922. The court then held that, "[i]f the Government

wishes to depose the taxpayer, it should obtain use immunity for him as to any criminal proceedings other than one relating to perjury." *Id* at 922. Upon remand, the "district court should stay further proceedings until the Government has obtained immunity for the taxpayer or until all applicable statutes of limitations have run." *Id* at 922. This court found that:

> [O]ur procedure accommodates both parties ... the Government is free to continue its efforts to collect any taxes due, subject only to the condition that, by its grant of immunity, it assures the taxpayer it has not ... [sought collection] ... as a means of investigating or promoting an investigation or prosecution of alleged criminal gambling activities. It is, of course, the danger that the collection procedure has been instituted to coerce the taxpayer to incriminate himself with respect to a potential criminal prosecution that gives us pause. Whether ... [it] ... is motivated by such considerations should become quickly apparent under the procedure we direct. If a rational basis ... is shown to exist and if the Government is willing to grant immunity to the taxpayer, there can be little doubt that the suit is genuinely designed ... in a manner approved by the Court ... If, on the other hand ... the Government is unwilling to seek use immunity, the taxpayer is due effective protection of his Fifth Amendment privilege, for there is a likelihood that the ... proceedings were initiated with a criminal prosecution in contemplation.

Id at 922.

The petitioner asks for no greater accommodation than that which would allow her to assert her Fifth Amendment privilege without having to forfeit her home in the process. As in *Shaffer*, the government should have no objection to the granting of use immunity if the court deems this to be the most appropriate form

of accommodation unless the initiation of parallel proceedings was not a coincidence but a concerted attempt to undermine the petitioner's fundamental rights. Such a remedy would alleviate the grave potential for the petitioner's Fifth Amendment privilege to be unconstitutionally burdened and would force the government to prove its struggle with the petitioner is fought on a level playing field.

IV. The government's support for its position is misplaced and fails to address the issue of the failure to accommodate the Defendant's Fifth Amendment rights.

The government relies solely on three cases in support of its motion to strike the Defendant's affidavit, *In Re Edmond*, 934 F.2d 1304 (1991); *United States v. Parcels of Land*, 903 F.2d 36 (1990); *United States v. Rylander*, 460 U.S. 762 (1983). All three cases are distinguishable and inapplicable to the Defendant's position. In fact, the *Parcels of Land* case provides support for the Defendant's position and not that of the government.

In *Parcels of Land*, the government sought forfeiture of the defendant's property alleging that it constituted proceeds traceable to the unlawful sale of controlled substances. The government introduced evidence that the defendant had purchased various properties and other items in the preceding ten years worth millions of dollars despite having an average annual income during that same period of approximately $27,000. The government also introduced a substantial amount of more direct evidence relating to the defendant's alleged drug activity.

The defendant submitted an affidavit in opposition to the government's motion for summary judgment which the government argued should be struck due to the failure of the defendant to agree to be deposed. However, the defendant *did not* argue that the government failed to accommodate his interest but that its attempted accommodation was insufficient. "The district court below *did* strive to accommodate Laliberte's [the defen-

dant] fifth amendment dilemma." *United States v. Parcels of Land*, 903 F.2d at 44. The court decided that a grant of immunity was the proper way to accommodate the defendant's Fifth Amendment privilege. "It entered a protective order prohibiting the use of Laliberte's deposition transcript, interrogatory answers and affidavit in any criminal proceeding." *Id* at 44.

The distinction between *Parcels of Land* and the petitioner's case is readily apparent. In *Parcels of Land*, the court *required* there to be an accommodation of the defendant's interests with the form of the accommodation left within the trial court's discretion. "So long as the district court attempts to accommodate a claimant's fifth amendment interests, the nature and extent of accommodation should be left primarily to that court's discretion." *Id* at 44. The petitioner is not arguing that the District Court failed to grant an adequate accommodation of her rights, but that it failed to grant *any* accommodation of her Fifth Amendment privilege. Although petitioner recommended to the District Court that the optimal form of the accommodation would have been a temporary stay of the forfeiture proceeding, any form of accommodation which was sufficient to protect her constitutional rights would have been acceptable. What petitioner asks this court for is precisely what the court in *Parcels of Land* granted, merely an accommodation of her Fifth Amendment privilege.

In *In Re Edmond*, 934 F.2d 1304, the defendant declared bankruptcy and the Maryland Consumer Protection division brought an action against the debtor to have his debts declared nondischargeable. The defendant attempted to submit an affidavit in support of summary judgment despite unconditionally refusing to be deposed on Fifth Amendment grounds. In that the court felt that the defendant was asserting his Fifth Amendment privilege for the sole purpose of hindering the plaintiff's discovery. "The Fifth Amendment privilege cannot be invoked as a shield to oppose depositions while discarding it for the limited

purpose of making statements to support a summary judgment motion." *Id* at 1308.

However, in *In Re Edmond*, the defendant unconditionally invoked the privilege in a blatant attempt to hinder discovery. The defendant never agreed to be deposed if his rights were accommodated. In addition there was no criminal prosecution ongoing at the time nor did the defendant shoulder the burden of proof in the action. These factors make petitioner's case distinguishable from *In Re Edmond* and cause that case to be deficient of any persuasive value.

In *United States v. Rylander*, 460 U.S. 762, the court was not faced with the assertion of the Fifth Amendment privilege in the context of parallel proceedings. The holding "did not concern the issue of parallel criminal and civil proceedings. The Court in *Rylander* considered the evidentiary effect of a fifth amendment claim and concluded that the fifth amendment does not excuse a claimant from meeting the appropriate burden of proof in his case." *Afro-Lecon, Inc. v. United States*, 820 F.2d at 1202. If the government wishes to advance this case for the proposition that petitioner's assertion of the Fifth Amendment does not relieve her burden of proof it is entirely appropriate. However, the case is wholly inapplicable to the proposition that petitioner's affidavit can be struck because she was forced to assert her Fifth Amendment privilege when her interests were not accommodated.

CONCLUSION

For the forgoing reasons, the District Court's ruling striking the Defendant's affidavit should be reversed. In that the District Court stated, "I think the affidavit, if it can be considered, is sufficient to create an issue of fact of whether she consented to and was aware of the drug activity going on within the premises that are sought to be forfeited." *Appendix B-8*, summary judgement is inappropriate. The case should be remanded to the District Court with instructions to deny summary judgement on the condition that the petitioner agree to be deposed under the shield of whatever accommodation the District Court deems sufficient.

Respectfully submitted,

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Counsel of Record
for the Petitioners
The Real Property and
Sharon Jarrell

August 31, 1992

CERTIFICATE OF SERVICE

I, Robert Cooper Whitestone, counsel for the Petitioners, and a member of the Bar of the Supreme Court of the United States, certify that three copies of this Petition for a Writ of Certiorari were hand-delivered on August 31, 1992 to the following: Gordon D. Kromberg, OFFICE OF THE U.S. ATTORNEY, 1101 King Street, Alexandria, Virginia 22314; and that one copy was mailed by certified mail, return receipt requested, to the Honorable John M. Greacen, Clerk of the United States Court of Appeals for the Fourth Circuit, 10th and Main Street, Richmond, Virginia 23219.

Robert C. Whitestone
Counsel of Record for Petitioners

APPENDIX A

UNPUBLISHED

UNITED STATE COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THE REAL PROPERTY AND PREMISES
KNOWN AS 4408 HILLSIDE COURT,
ALEXANDRIA, VIRGINIA 22306,
Defendant-Appellant,

SHARON JARRELL,
Claimant-Appellant.

No. 91-2218

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CA-91-567-A)

Argued: April 7, 1992
Decided: June 2, 1992

Before HALL and MURNAGHAN, Circuit Judges, and
WARD, United States District Judge for the Middle District
of North Carolina, sitting by designation

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Robert Cooper Whitestone, WHITESTONE, BRENT, YOUNG & MERRIL, Fairfax, Virginia, for Appellants. Gordon Dean Kromberg, Assistant United States Attorney, Alexandria, Virginia, for Appellee. ON BRIEF: Richard Cullen, United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

I.

The present appeal contest an August 30, 1991, grant of summary judgment against the appellant, Sharon Jarrell, and an order forfeiting her property to the United States government.

On April 24, 1991, the government filed a complaint for forfeiture of appellant's real property pursuant to 21 U.S.C. § 881(a)(7) (1989),[1] alleging that the property had been used to facilitate the commission of felony narcotics violations. Jarrell was the sole non-government claimant to assert an interest in the property. On April 25, 1991, the Commonwealth of Virginia filed a criminal charge against Jarrell. That charge was subsequently dropped.[2]

The government noticed a deposition for Jarrell on July 23, 1991, but she, though her counsel acknowledged receipt of the

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[1] 21 U.S.C. §881(a)(7) reads as follows:

> The following shall be subject to forfeiture to the United States...
>
> All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land...which is used, or intended to be used...to commit, or facilitate the commission of a violation of [Title 21] to be punishable by more than one year's imprisonment...

[2] The criminal charge concerned a single narcotic possession count.

notice, declined to appear, asserting "her Fifth Amendment right not to incriminate herself with respect to any questions involving the possession or distribution of cocaine" or knowledge of any such activity on her property.

The government filed a motion for summary judgment on August 9, 1991, claiming that it was entitled to a judgment of forfeiture as a matter of law. In support of the motion, the government offered the affidavit of a Fairfax County Police officer who alleged that Jarrell had made a variety of admissions regarding her knowledge of drug sales and the use of her premises. Jarrell thereupon filed an affidavit denying the charges and denying that she had made self-incriminating statements, and filed an additional similar affidavit. On August 29, 1991, the government moved to strike Jarrell's affidavits on the grounds that she had previously asserted her Fifth Amendment right as a justification for her refusal to be deposed. In a hearing the following day, the district court granted the motion to strike the Jarrell affidavits and also granted the government's motion for summary judgment.[3] The order of forfeiture has been stayed pending the outcome of the present appeal.

The district court had ample authority to strike Jarrell's affidavits. In the absence of the affidavits, the government was clearly entitled to a grant of summary judgment.

II.

The residence in question is 4408 Hillside Court in Fairfax County, Virginia. In 1986 and 1987 various felonious narcotic activities originated from, or were directly connected to, 4408 Hillside Court. Cocaine was purchased at the residence, and

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[3] In ruling on Jarrell's affidavit, the district judge said: "I don't think she can take the Fifth Amendment when she is sought to be deposed, and then come in and, after depriving the Government of its discovery effort, file an affidavit which creates an issue of fact. I think the affidavit must be stricken...and absent the affidavit, the Government is entitled to summary judgment."

away from the residence from people who lived there. Though Jarrell never admitted that she sold narcotics, individuals who did admit to selling it stated that Jarrell and her boyfriend had sold drugs in the past.

In 1991, Police Detective David A. Crank of the Fairfax County Police, armed with information gained from an informant, obtained a search warrant for 4408 Hillside Court. During the search of the residence investigators found a cocaine grinder containing Jarrell's fingerprints, a purse containing one ounce of cocaine, documents resembling drug "owe sheets," and a scale. At that time, Miguel Langebeck, a resident of the Hillside Court home, and a former husband of Jarrell, was arrested on drug possession and distribution charges.

Jarrell was interviewed by Crank several times between February and May of 1991. The content of the interviews was contradictory, but Jarrell made significant incriminating statements, according to Crank. Additionally, the Fairfax County Police received numerous statements from other individuals involved in the drug trade suggesting that both the 4408 hillside Court residence and Jarrell were intimately involved in narcotics activity.

III.

To justify forfeiture under 21 U.S.C. §881(a)(7), the government must establish probable cause for belief that the property to be forfeited was used to facilitate the criminal activity defined by the statute. *Boas v. Smith*, 786 F.2d 605, 609 (4th Cir. 1986). Once probable cause is shown, the burden shifts to the property owner to show, by a preponderance of the evidence, that the property was not used in the alleged manner. Id.

In the case at hand, Jarrell did not dispute that there was a showing of probable cause, but attempted to meet the burden of disproving the government's case with an affidavit denying

participation in, or knowledge of, illegal activity on the premises. The district court, however, struck the affidavit from the record, granting summary judgment for the government, and concluding that Jarrell could not avail herself of her Fifth Amendment rights, thereby failing to respond to a government noticed deposition, and then provide testimony by her own affidavit concerning the facts at issue in the proposed deposition.

Jarrell has argued that the district court's ruling constituted an impermissible punishment for the exercise of constitutional rights. Specifically, she has contended that parallel criminal drug investigations and civil forfeiture proceedings present a claimant with conflicting interests concerning exercise of Fifth Amendment protections. Jarrell has suggested that, in response to the criminal investigation, it would almost certainly be most prudent for a claimant to say nothing, and that the consequent silence could not be held against her in a criminal trial. In the civil forfeiture proceedings, however, such silence might be used to provide an inference in the government's favor.[4] She has argued that it is the responsibility of the district court in a proceeding of the present kind to accommodate the government's interest in stemming the harmful flow of illegal drugs with an individual's Fifth Amendment rights, whenever possible.

Jarrell has suggested that the district court could have accommodated the competing interests involved here with one of two relatively simple procedural steps. First, according to Jarrell, the court could have stayed the forfeiture proceedings, and thereby delayed the need for the notice of deposition, until the criminal proceedings against her had concluded. Second, Jarrell has contended that the court could have immunized her from criminal liability arising from anything stated in the forfeiture proceeding. Unfortunately for Jarrell, however, the issue

[4] The government in the present case has sought such an inference of knowledge of drug activity arising out of her failure to attend the noticed deposition.

on appeal is not what the district court could, or might, have done, but whether what it actually did was proper. Accordingly, we must determine whether Jarrell's original exercise of the Fifth Amendment protection justified the striking of the subsequent affidavit.

The government has successfully countered the assertion that an impermissible burden on Jarrell's Fifth Amendment rights was occasioned by the parallel proceedings involved here. In any situation in which the Fifth Amendment is invoked, a risk exists that the silence of the party pleading the Fifth Amendment may prove damning if the opposing party is able to introduce substantial evidence. In the present case, Jarrell, it may be assumed, had valid reasons for not wanting to testify prior to the dismissal of the criminal proceedings, but she had countervailing and similarly valid reasons for wanting to make a statement to the government concerning the house, and her knowledge (or the lack thereof) of its use for illegal activity.[5] But the fact that valid concerns weighed on both sides of her dilemma does not indicate that Jarrell was improperly punished for making the choice she made.

As we stated in In Re Grand Jury Subpoena, 836 F2d 1468, 1472 n. 4 (4th Cir. 1988):

> In many civil cases the burden placed on a person's silence may be unavoidable. Where a plaintiff has gathered sufficient evidence to establish a claim prior to discovery, a defendant who risks incrimination by speaking will inevitably fact the choice of forsaking silence or losing a civil judgment, even if the defendant's silence is not used against him.

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[5] In fact, the limited nature of her alleged criminal offense, and the lack of a direct connection between that offense and an assertion that the premises were being used in ongoing drug activity, would have allowed Jarrell to testify on deposition as to perhaps the entire factual basis for the government's forfeiture action without making any incriminating statement about her own alleged criminal activity.

The "plaintiff" in the present case, the government, has presented significant facts to support its claim. The defendant, Jarrell, has been provided with a choice of taking her chances on a verdict or judgment absent testimony, or asserting a defense by providing an affidavit. Jarrell could have chosen either path, but could not, as she here attempts, have chosen both paths at the same time.

In Re Edmond, 934 F2d 1304 (4th Cir. 1991), we held that a district court is justified in striking an affidavit when a party has selectively asserted "his Fifth Amendment privilege...as a shield to oppose depositions while discarding it for the limited purpose of making statements to support a summary judgment motion." Id. at 1308. Although the statements presented in the present case were intended to withstand a summary judgment motion, the same standard, regarding the responsibilities and future options of a party who avoids a deposition, applies to the present case.

The First Circuit, in a case involving an almost identical forfeiture procedure, parallel criminal action, and failure to answer a government deposition, held that "the district court had ample authority to strike [claimant's] affidavit after he invoked the fifth amendment and States v. Parcels of Land, 903 F.2d 36, 43 (1st Cir. 1990). The court went on to indicate that a district court, in a forfeiture proceeding, "if the forfeiture would genuinely prejudice the claimant's fifth amendment rights...should seek alternative means of accommodating both the claimant's rights and the government's interest in the forfeiture." Id. at 44.

Jarrell has sought refuge in the language indicating a preference for accommodation by construing it to indicate that the district court's failure to provide some kind of accommodation in the present case constituted reversible error. If Jarrell had actively sought such an accommodation at the proper time, her claim would have had a greater chance of success. However,

during the four month discovery period provided, Jarrell sought no delay, protective order, or other accommodation from the government or the district court. She, following the extensive discovery period, attempted to assert, after receiving the government's motion to strike her affidavit, that she had significant interests in discovery that had not been addressed by the district court. Her failure to state the proposed need for accommodation of her Fifth Amendment rights earlier failed to provide the district court with an opportunity to balance those rights with the right of the government as her opponent. The failure suggests that the motive for her timing of the affidavit may have been the attaining of an unfair discovery advantage, and not, as she asserts, the promotion of her constitutional rights. While the responsibility of a district court to seek an accommodation for an individual's rights in a forfeiture proceeding may be significant, the district court's failure here sua sponte to impose such an accommodation cannot be seen as reversible error no accommodation was proposed at the relevant time by the complaining party.[6]

Accordingly, the district court did not err in striking Jarrell's affidavit. Additionally, since she offered no other evidence to create a doubt regarding any issue presented by the government, the grant of summary judgment was proper.

AFFIRMED

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[6] Additionally, by the time that Jarrell raised an objection to the treatment of the affidavit, no "accommodation" of the competing interests was available to the court. The only options remaining for the court were to allow the affidavit to be admitted or to strike it. There was no opportunity to allow the government the fruit of the early discovery while shielding appellant from the criminal consequences of her statements. Jarrell had already been shielded by her silence and the dismissal of the criminal complaint. The allowance of the affidavit would, therefore, not amount to an accommodation or balancing, but, to a clear benefit to Jarrell, allowing avoidance of the harm caused by early testimony, while preventing the government from carrying out normal discovery procedures.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,

Plaintiff,

vs

4408 HILLSIDE COURT, ALEXANDRIA, VIRGINIA,

Defendant.

CIVIL ACTION
NO. 91-567-A

Friday. August 30, 1991
Alexandria, Virginia

Transcript of motion proceedings in the above-captioned matter.

BEFORE: The Honorable ALBERT V. BRYAN, JR.,
Judge United States District Court

APPEARANCES: *FOR THE UNITED STATES:*
GORDON KROMBERG, ESQUIRE
Assistant U. S. Attorney
1101 King Street, Suite 502
Alexandria, Virginia 22314

FOR THE CLAIMANT:
ROBERT C. WHITESTONE, ESQUIRE
OF: WHITESTONE, BRENT,
YOUNG & MERRIL, P.C.
10513 Judicial Drive, Suite 300
Fairfax, Virginia 22031-5114

PROCEEDINGS

THE CLERK: Civil Action No. 91-567-A, United States of America vs. 4408 Hillside Court, Alexandria, Virginia.

MR. KROMBERG: Good morning, Your Honor; Gordon Kromberg for the United States.

THE COURT: Mr. Whitestone?

MR. WHITESTONE: Good morning; Bob Whitestone for the claimant, Ms. Gerald.

THE COURT: This comes on on the Government's motion for summary judgment, and more importantly, on the Government's motion to strike the Claimant's affidavit, which it seems to me probably ought to be addressed first, Mr. Whitestone.

MR. WHITESTONE: I will be happy to do that.

Your Honor, if the Court please, with regard to the Government's motion to strike the affidavit, the Government relies upon the case of United States vs. A Parcel of Land at 903 F. 2d., page 36.

And the Court has got to understand the context. I will be very brief about this. I don't recall the exact date, but at about the same time that this forfeiture action was commenced, my client was also charged in the Circuit Court of Fairfax — I'm sorry, arrested and charged with possession of cocaine with the intent to distribute it, the same cocaine that is a part of this case, in the Court System in Fairfax. Actually, it is at the General Court level. There still hasn't been a preliminary hearing on it. So there are parallel cases that are presently proceeding. There is a prosecution for violation of State law, and this forfeiture action, going down parallel tracks.

It is my belief —

THE COURT: (Interposing) How is she — if she is taking the fifth amendment at the deposition, or refusing to engage in

the deposition because of the fifth amendment, how is she going to testify at trial in support of her claim?

MR. WHITESTONE: Your Honor, it is my hope that the State prosecution is over by the time this civil case is heard, quite honestly. The case is set for preliminary hearing shortly. I am hopeful that it will be tried and disposed of before the case is actually heard in this Court, which as I recall is a date in October. So I believe the State prosecution will have been terminated.

THE COURT: All right.

MR. WHITESTONE: So that she will no longer have to rely upon her fifth amendment. We would not have done that had this prosecution followed the — I'm sorry — this forfeiture action followed the State prosecution, but it is paralleling it.

As stated in the 903 F. 2d., the Court of Appeals in the First Circuit suggests that the District Court has got to accommodate a claimant's fifth amendment interests. It is left in the Court's discretion.

I hope Your Honor will understand that we have this prosecution that is pending in State Court, which I hope is terminated. Now there are issues involving search and seizure which I hope will be dispositive of the State Court prosecution. It is a "no-knock" entry. I am of the opinion that it is an inappropriate entry. I believe the State prosecution will have been terminated before this matter comes to Court.

There are elements of evidence that are obviously involving both of these cases.

THE COURT: What is the schedule on which the State Court proceeding is? Is it set for trial?

MR. WHITESTONE: No, sir. I believe there will be an indictment.

THE COURT: He has not been indicted? Or she has not been —

MR. WHITESTONE: Has not been indicted. But the indictment will come September 17, if there is in fact an indictment. That is my recollection of the schedule of events.

I believe this case is set for trial in either late October or whatever. And I will try to get the State Court case set. I'm sure they won't give me a whole lot of problems either in doing that. I'll try to get that case set immediately after indictment. In any event, I'll make an effort to get it set before this case is tried. I think this will be dispositive of that.

I don't have any problem if after the State Court prosecution is terminated, the Government takes her deposition. The problem with it is that it puts an almost intolerable burden upon a defendant to have, to be interrogated under oath in a civil proceeding at the same time that a criminal proceeding, which is almost inextricably intertwined with the civil proceeding is pending. I would respectfully suggest that the Court, as is suggested at page 44, accommodate Ms. Gerald's fifth amendment right, at least until this matter can be resolved in the Circuit Court or General District Court, whichever. It could be dismissed in a General District Court in Fairfax.

Now, I don't know if the Court wishes me to address that further or not, but I believe —

THE COURT: (Interposing) Well let me hear what Mr. Kromberg has to say.

MR. KROMBERG: Good morning, Your Honor.

There are many problems with Mr. Whitestone's plan. One of them is that discovery closed in this case, and I realize the court can reopen discovery. But the Government has had to reveal its entire case and allowed Ms. Gerald to tailor her affidavit to combat and contradict the evidence in the case. As a result of finding out what the Government's evidence is, Mr. Whitestone's client has obtained, has gone to witnesses and obtained retractions. The Government is unable to disprove or

verify anything that Ms. Gerald would say, because we don't know what she would say.

If we were enabled to depose her right before trial, that would be of a benefit as compared to not being able to depose her at all, but our case has been structured on the fact that we haven't been able to talk to her. And it would be unfair for one side to get the benefit of discovery against the other side, and yet not, and the Government's case has been structured without being able to take the fundamental step of discovery of the Claimant in this case.

And in that respect, Your Honor, if there was a time for the Claimant to move for accommodation of his — excuse me — of her fifth amendment rights, it isn't now at the moment of the summary judgment case decision. It was months ago.

THE COURT: Well, her affidavit is sufficient it seems to me, without regard to whether it ought to be stricken or not, to create issue of fact, whether she consented to and was aware of the drug activity in these premises. I am concerned about making an affidavit after having taken the fifth amendment when her deposition was scheduled.

MR. KROMBERG: Your Honor, I agree that that's certainly a problem, but I would like to point out to the Court though that even taking her affidavit into consideration, there is certainly probable cause. There is no question about the probable cause.

THE COURT: The Claimant doesn't deny that there is probable cause.

MR. WHITESTONE: I concede that. That 's correct. I concede that now.

MR. KROMBERG: So the next issue is, is there any evidence, is there any undisputed evidence of knowledge or consent and in fact in this case, there are requests for admissions that were admitted that should, that aren't disputed because the Claimant has admitted that she told the investigator that she

wrote the owe sheets that were seized out of the house, and she wrote them to educate herself in the narcotics business.

THE COURT: Well, but she retracts that in her affidavit, doesn't she?

MR. KROMBERG: Well, she retracted it in a second affidavit that was made yesterday after receiving the Government's response saying that the first affidavit left open issues of fact. That's true. But even — let's take the second affidavit as true. She retracts it. The fact is she made the admissions. If she will make the admissions, that is controlling for the case. That's the purpose of a request for admissions. You can't admit something in a request for admission and then say, well, it doesn't count because I didn't really mean it. Thank you.

THE COURT: Do you want to be heard any further?

MR. WHITESTONE: Your Honor, there have been discussions and I think perhaps misunderstandings, not deliberate or whatever, but misinterpretations of questions and answers and what not, and I simply suggest this. I think that in this motion for summary judgment, the Government talks about fairness. Here we have got a lady who is facing State charges, which carry punishments of up to five to 40 years in the penitentiary, and the Government is trying to take her house at the exact same time. She is attempting to try, and this is what we are trying to do in this particular case. She is attempting to try to at least preserve her right not to incriminate herself in the State prosecution, while at the same time attempting to comply with the requirements in this particular case with regard to discovery as well as responding to admissions and so forth in this forfeiture action.

It is almost an intolerable burden to be placed on an individual. I am suggesting to the Court that this affidavit not be stricken. There are material issues of fact, that is whether she knew the house was being used to facilitate —

THE COURT: (Interposing) Right, but there is something — using the fifth amendment as a sword, not a shield, when you refuse to be deposed on the ground that it will violate your fifth amendment right not to incriminate yourself, and then in opposition to a motion for summary judgment, file an affidavit which the Government cannot explore because your client takes the fifth amendment.

MR. WHITESTONE: Your Honor, I understand what the Court is saying, but again the defendant is in the unusual position.of having to defend herself in one Court with regard to criminal charges and defend herself in essence in another Court with regard to civil charges. And in the second Court, in this Court, if she doesn't file an affidavit, she loses her house. She is compelled to file an affidavit.

I was very concerned that by filing, the affidavit, that that has waived her fifth amendment privileges, and that she is in essence —

THE COURT: (Interposing) I'm not sure that it hasn't, but that's not an issue that I —

MR. WHITESTONE: (Interposing) I mean, it's bothering me because: as I have indicated, we are going on parallel tracks, sort of steaming toward a resolution of two cases, and she is sort of betwixt and between. I am not happy that I am in this position as her counsel, but in any event, if the Government needs, wants to depose her and the court is inclined to say that they have the opportunity to depose her since she has filed an affidavit, I would have to suggest to her that then she has got to make that decision whether she is going to depose it or not —

THE COURT: Well, we are here today to resolve the motion for summary judgment. We are not running school on what —

MR. WHITESTONE: (Interposing) All right, I understand that. Then I would suggest —

THE COURT: — legal advice she ought to get.

MR. WHITESTONE: Then I suggest that as the Court of Appeals says in the First Circuit, that it's discretionary with the Court, but I would respectfully suggest to the Court that her reliance upon her fifth amendment right at the time of the deposition was an appropriate action based upon her, based upon the present and parallel prosecution in the State Court for the possession with intent to distribute cocaine, which was found in the house.

Now, that case is presently, as I have indicated, awaiting preliminary hearing. It was my opinion that she exercised that fifth amendment privilege in good faith because of that pending prosecution, and I would respectfully suggest to the Court that likewise, she has filed the affidavits in good faith in an effort to try to comply with the requirements more or less of these forfeiture cases. She does not contest the issue of probable cause. I concede that the Government has established that. We are asking that the matter be continued for trial on the fundamental issues of whether she was aware that the property was used to facilitate the distribution of a controlled substance.

I am respectfully suggesting to the Court that that is a legitimate issue and a material issue of fact, that she has never conceded either in answers, admissions, affidavits or whatever.

THE COURT: I think the affidavit, if it can be considered, is sufficient to create an issue of fact of whether she consented to and was aware of the drug activity going on within the premises that are sought to be forfeited; but I don't think she can take the fifth amendment when she is sought to be deposed, and then come in and, after depriving the Government of its discovery effort, file an affidavit which creates issues of fact. I think the affidavit must be stricken, and I will strike it, and absent the affidavit, the Government is entitled to summary judgment. And since the issue of probable cause is not contested by the

Claimant, summary judgment will be entered in favor of the Government. I will prepare the order.

MR WHITESTONE: Would the Court just note our exception.

MR. KROMBERG: Thank you, Your Honor.

(Whereupon, the proceedings in the above-captioned matter were concluded.)